

**Before the
Federal Communications Commission
Washington, D.C. 20554**

| | | |
|---------------------------------|---|---------------------|
| In the Matter of |) | |
| |) | |
| Accelerating Wireline Broadband |) | WC Docket No. 17-84 |
| Deployment by Removing Barriers |) | |
| to Infrastructure Investment |) | |

To the Commission:

REPLY COMMENTS OF ILLINOIS ELECTRIC COOPERATIVE

Illinois Electric Cooperative (“IEC”) hereby submits reply comments pertaining to the Federal Communications Commission’s (“FCC”) Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, adopted November 16, 2017, and released November 29, 2017, concerning the acceleration of wireline broadband deployment.

I. INTRODUCTION

The FCC recognizes that “high-speed broadband is an increasingly important gateway to jobs, health care, education, information, and economic development. Access to high-speed broadband creates economic opportunity, enabling entrepreneurs to create businesses, immediately reach customers throughout the world, and revolutionize entire industries.”¹ Accordingly, the FCC, through this proceeding, proposes and seeks comment on a number of actions designed to accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment. IEC

¹ FCC Docket WC 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC-CIRC 1704-2 ¶1 at p2, March 30, 2017.

submitted comments in this docket on January 18, 2018. In these reply comments, IEC addresses three issues raised in other parties' comments in this docket as follows: 1) importance of recognizing local interests; 2) necessity for preemption; and 3) authority of the FCC to prohibit state and local laws inhibiting broadband deployment.

II. IEC BACKGROUND

IEC has a proven track record of providing high-speed broadband and affordable internet access to the communities it serves. Further, IEC seeks to continue, on a not-for-profit cooperative basis, its investments in such infrastructure and provide the opportunity for all stakeholders in its communities to benefit from such investments. IEC also believes that if it did not provide broadband internet service, it simply would not be available in many parts of its service territory.

III. THE FCC'S REQUEST FOR COMMENT

IEC appreciates the FCC's request for comment and, having reviewed parties' comments, will reply to certain selected issues. The lack of a response to any particular proposal in these reply comments does not necessarily mean that IEC supports the particular position.

A. Importance of recognizing local interests

IEC has firsthand knowledge of the benefits its broadband service² brings to school districts, businesses, and homes. Further, IEC agrees with commenters in this docket that cooperation at the local level and understanding of local stakeholders' perspectives

² Service is defined as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology," and, as such, may be considered "advanced telecommunications capability" pursuant to 47 U.S.C. 706 so long as they meet the Commission's current speed benchmark of 25 Mbps download/3 Mbps upload (25 Mbps/3 Mbps). See 2018 Broadband Report, Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 17-199, ¶ 15. (Rel. Feb. 2, 2018)

is essential. IEC has been applying such local knowledge and understanding of local stakeholders' perspective since 1936. Consistent with both FCC policy and IEC experience, IEC continues to see an increasing importance to serve unserved and underserved communities within its territory. The FCC's policy provides proper context to this proceeding in that it is entirely consistent with well-established Illinois³ and national broadband policy.⁴ Local communities and units of government recognize the need and value of access to advanced telecommunications services.⁵

It is in this context that IEC disagrees with assertions by the City of New York and City of Eugene, Oregon that (1) inherent barriers occurring at the local level are best left to local authorities to address and (2) FCC preemption of barriers emerging at the local level is inherently unhelpful and unwarranted.⁶ While IEC has continuing success in working with local stakeholders, it does see the need to go beyond local-level cooperation in overcoming certain historically rooted barriers. In addressing barriers such as incongruous state policy, IEC and the local officials both agree that action beyond the local level is not appropriate, but necessary. Through their rejection of FCC's public policy role, the Cities of New York and Eugene fail to consider where incongruous state policy needs to be reconciled in order to provide relief to local communities. IEC continues to

³ Executive Order 9 (2005) Establishment of the Illinois Broadband Deployment Council.

⁴ Statement of Commissioner Ajit Pai Re: Technology Transitions, GN Docket No. 13-5; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353; Connect America Fund, WC Docket No. 10-90; Structure and Practices of the Video Relay Service Program, CG Docket No. 10-51; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket No. 03-123; Numbering Policies for Modern Communications, WC Docket No. 13-97. Final paragraph at p.2 (January 31, 2014).

⁵ Reply Comments of Illinois Electric Cooperative Exhibits A-F, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment WC 17-84 (July 17, 2017).

⁶ City of Eugene, Oregon Ex Parte Submission "Accelerating Wireless Broadband Deployment" at Attach. 2 p1 WC Docket 17-84; Comments of the Cities of San Antonio Texas, Eugene Oregon, Bowie Maryland, Huntsville Alabama, and Knoxville Tennessee, NPRM/NOI WC 17-84 at 1 (June 15, 2017) and Comments of the City of New York on Further Notice of Proposed Rulemaking Adopted November 16, 2017, Released November 29, 2017.

observe first-hand how local communities are deprived of opportunities in the absence of a broadband infrastructure.

B. Necessity for preemption

As stated in its comments in this docket, in most of IEC's service territory and in many rural areas and small towns across America, there are no public utility rights-of-way. These situations exist because in the past local governments did not, for one reason or another, bother acquiring land for roadways and instead simply obtained easements for roads from area landowners. Because the local governments do not own the land, but rather only hold easements for the roads, and they cannot, therefore, grant an easement for broadband and other public utility facilities.

The Cities claim that multiple litigated proceedings somehow obviate the need for any alternatives provided through Section 253 preemption.⁷ The Cities have also characterized FCC engagement as intrusive, unwarranted, and counterproductive.⁸ These characterizations appear to question the FCC's stated policy of advancing broadband access.

IEC's experience has proven exactly the opposite of both such claims. For example, simply because litigation may provide the means for obtaining authority to construct broadband facilities does not mean that litigation is appropriate. In many cases, numerous court proceedings with favorable outcomes are required simply to provide broadband access to a single municipality or community. Even if IEC were to prevail in such proceedings, the costs and time expended on litigation could render broadband access cost-prohibitive or limit the scope of deployment due to cost constraints. IEC's

⁷ Id.

⁸ Id.

position is evidenced by testimonials from local leaders, businesses, public safety officials, and the general public. These testimonials are pleas for greater access to broadband. The legal impediments created by the historic lack of public rights-of-way clearly present undue barriers to broadband deployment. These barriers provide no public benefit while resulting in a digital divide for communities within a particular county.⁹ For the reasons illustrated above, IEC clearly sees a need for the FCC to adopt rules based on IEC's proposal in this docket.¹⁰

C. Authority of the FCC to prohibit state and local laws inhibiting broadband deployment.

Consistent with its previously submitted comments in this matter, IEC continues to maintain that the FCC should exercise preemption authority at least under the limited circumstances described in its comments—ie: when the lack of public rights-of-way impedes the simple act of hanging fiber optic cable on existing utility poles on private property.¹¹ While the scope of the FCC's preemption authority is doubted by the Cities, IEC contends that Section 253(d) of the Telecommunications Act of 1996 ("TA96") 47 U.S.C. 151 et seq., provides for the preemption sought by IEC. As IEC explained in its comments, Illinois' Eminent Domain Act ("EDA"), 735 ILCS 30/1-1-1 et seq., has the effect of prohibiting telecommunication services by requiring a carrier to obtain a de minimis easement simply to hang fiber on existing poles. IEC recognizes the need to compensate landowners for what amounts to an easement to use airspace. But rather than have to

⁹ Reply Comments of Illinois Electric Cooperative, FCC Docket WC 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, Exhibits A-F.

¹⁰ Comments of Illinois Electric Cooperative FCC Docket WC 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, at 5-8.

¹¹ Comments of Illinois Electric Cooperative, FCC Docket WC 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, at 4-9, January 17, 2018.

adjudicate the value of each such easement; IEC urges the FCC to narrowly preempt such eminent domain statutes by establishing the level of compensation for such minimal intrusions with this type of easement. To be clear, IEC is not seeking to take private property without just compensation. The EDA was designed to prevent that from happening. But what the EDA was not meant to do is prevent the deployment of broadband by forcing broadband providers to litigate with multiple landowners for de minimis easements. Moreover, in IEC's experience, some landowners do not even object to providing an easement under the terms offered by IEC – they simply neglected to respond to IEC's request for an easement, forcing IEC to take the time and expense to condemn the minimal easement.

The FCC seeks comment on a number of specific areas where it could utilize its authority under Section 253 to enact rules to prevent states and localities from enforcing laws that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” The state or local impediments to be preempted do not have to specifically target telecommunications service. The FCC also expressed a willingness to consider several issues, including adopting rules prohibiting excessive fees and other costs that may have the effect of prohibiting the provision of telecommunications service. The expense associated with litigating de minimis easement compensation amounts to excessive fees that have the effect of prohibiting the provision of telecommunications service.

In practice, IEC notes that preemption under Section 253(d) has been considered by the FCC on a case by case basis. IEC also acknowledges that it is not aware of the FCC, or any court, addressing preemption under Section 253(d) on a broader proactive

basis. IEC submits, however, that the absence of a proactive approach to preemption should not mean that the FCC should not consider an easement compensation cap as proposed above in a rulemaking incorporating notice and an opportunity for public comment. The circumstances triggering the availability of the cap (ie: hanging broadband facilities on existing poles on existing electric easements) are sufficiently defined to lend themselves to rule language. The nature of the intrusion on the privately owned parcels is also sufficiently nominal to warrant a prescribed compensation cap. Although adopted prior to the TA96, the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.* clearly reflects the notion that the extent of the intrusion is a factor in determining the compensation. ("Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due." *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 437, 102 S. Ct. 3164, 3177 (1982))

In the context of Illinois law that would be preempted under IEC's proposal, those provisions of the EDA and associated caselaw relating to valuation in condemnation actions would be set aside when the right circumstances arose. In the absence of such circumstances, Illinois' EDA and related case law would remain in full force and effect.

Accordingly, IEC disagrees with the Cities of New York and Eugene that the FCC lacks the authority to preempt such barriers. While parties have pointed out that there are no special preemption provisions in the TA96 applicable to disaster recovery, no party spoke against the Commission's authority to preempt unduly obstructive state law where there may be no other remedy than costly and time-consuming litigation. IEC agrees with the various commenters that local cooperation often produces the best

results. IEC has also found that preemption would be welcomed by these local communities if it provided relief from the historic barriers hampering IEC's broadband deployment efforts. In its comments in this docket IEC provided a proposal that respects private landowner rights while recognizing the public interest in hastening local, state, and national goals of broadband access.¹²

IEC strongly urges the FCC to employ its authority under Section 253(d) of TA96 to preempt the value setting provisions in existing state condemnation statutes to facilitate the deployment of broadband under the narrow circumstances set forth in IEC's comments.

IV. CONCLUSION

IEC respectfully reaffirms its request that the FCC consider using preemption to remove the uncertainty regarding the value that state courts may assign to nominal impact easements (e.g. an easement allowing fiber to be hung from existing utility poles) which frustrates, delays and jeopardizes broadband deployment projects throughout rural America.

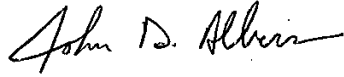
Dated: February 16, 2018

Respectfully Submitted,



Thomas D. Meehan III
President
Illinois Electric Cooperative
Two South Main Street
Winchester, Illinois 62694
217 243 8700

¹² Comments of Illinois Electric Cooperative, FCC Docket WC 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, at 5-8.



John D. Albers, Counsel
Shay Phillips Ltd.
230 S.W. Adams Street, Suite 310
Peoria, IL 61602
309 494 6155



Peter J. Wagner
Consultant to Illinois Electric Cooperative
Wagner Consulting LLC
5 Pickering Lane
Springfield, Illinois 62712
217 620 1018